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Nos. 85-1105, 85-1118 and 85-1120

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES D. CARTER AND CHRISTOPHER MOSCATIELLO, PETITIONERS

v.

UNITED STATES OF AMERICA

MICHAEL F. MURRAY, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN M. ROONEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether a search warrant must be obtained in order to conduct a search of a motor vehicle stopped in the driveway of a private residence (No. 85-1120).

2. Whether evidence observed during a warrantless entry into building should be suppressed if it would inevitably have been discovered during the subsequent search of the building pursuant to a valid search warrant (Nos. 85-1105, 85-1118).

3. Whether the court of appeals correctly computed the time excludable under 18 U.S.C. 3161(h)(1)(F) for disposition of pretrial motions in determining whether the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, was violated.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1105

JAMES D. CARTER AND CHRISTOPHER MOSCATIELLO, PETITIONERS

v.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A30)[1] is reported at 771 F.2d 589. The orders of the district court (Pet. App. A31-A50) are unreported.

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[1] "Pet. App." refers to the appendix to the petition in No. 85-1105.

JURISDICTION

The judgment of the court of appeals (Pet. App. A51) was entered on August 26, 1985. Petitions for rehearing were denied on October 31, 1985 (Pet. App. A52-A53). The petition for a writ of certiorari in No. 85-1105 was filed on December 26, 1985. The petitions for a writ of certiorari in Nos. 85-1118 and 85-1120 were filed on December 30, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioners Carter and Murray were convicted on one count of conspiracy to possess a quantity of marijuana in excess of 1000 pounds with intent to distribute, in violation of 21 U.S.C. 841 and 846. Each was sentenced to four years' imprisonment and fined $15,000. Petitioners Rooney and Moscatiello each entered conditional guilty pleas to one count of possession of a quantity of marijuana in excess of 1000 pounds with intent to distribute, in violation of 21 U.S.C. 841. Rooney was sentenced to 15 months' imprisonment, to be followed by a two-year special parole term, and fined $15,000. Moscatiello was sentenced to 18 months' imprisonment, to be followed by a two-year special parole term, and fined $15,000.[2] The court of appeals affirmed (Pet. App. A1-A30).

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[2] The trial court dismissed two counts against petitioners Carter and Murray at the close of the government's case, and the jury acquitted Carter on two other counts. The court also dismissed one count against co-defendant Steven David King and the jury returned a verdict of not guilty as to the remaining count on which he was charged. The court granted co-defendant Joseph Murray's motion for a judgment of acquittal. Co-defendant Arthur Michael Barrett became a fugitive before trial.

1. The evidence developed at a suppression hearing and at trial is summarized in the opinion of the court below (Pet. App. A2, A9-A11, A13-A16). FBI investigators learned from informants that, between early 1982 and March 1983, petitioner Rooney, Arthur Barrett, and others were involved in a large-scale marijuana importation and distribution network operating out of a garage in South Boston. Consequently, in July 1982 the agents commenced surveillance of the suspects' activities, verified their regular association, and learned from other informants that they maintained a warehouse somewhere in South Boston in which they stored marijuana.

On April 5 and 6, 1983, the agents observed petitioners and others engage in a pattern of activity that included clandestine efforts to load, transport, and deliver material in a white Ford truck, a green camper and a blue van (Pet. App. A15-A16). During the early afternoon of April 6, the agents stopped the green camper, which was being driven by petitioner Moscatiello, along with a red jeep that was accompanying it, on the Massachusetts Turnpike and arrested the two drivers. Upon entering the cab of the camper to move it to the roadside, one of the agents observed burlap-covered bales inside the camper. Upon examination pursuant to a search warrant, the bales proved to contain marijuana. Other agents followed the white Ford pickup truck driven by petitioner Rooney from the time it left a warehouse until it stopped in a driveway at a private residence. As Rooney left the vehicle, he was placed under arrest. One of the arresting officers smelled the odor of marijuana emanating from the vehicle and used a key taken from Rooney to open its door. Inside, he observed approximately 60 bales of marijuana. At approximately the same time, other agents stopped the blue van and arrested petitioners Carter and Murray. *Id.* at A9-A10.

The agents then converged on the warehouse where the vans apparently had been loaded. There, they observed a man pacing back and forth in front of the building ob-

serving traffic as it passed. After the agents drove around the block, however, the man disappeared. Shortly thereafter, other agents arrived on the scene, and attempts were made to determine whether anyone was inside the building by banging on its door and announcing the presence of law enforcement officers. When these efforts proved unsuccessful, the agents made a warrantless forced entry of the building "in an effort to apprehend any participants who might have remained inside and to guard against the destruction of possibly critical evidence" (Pet. App. A41). The agents made a brief walkthrough of the premises, determined that no one was inside, and then departed and guarded the building from the outside. In the course of walking through the building, the agents detected a strong odor of marijuana and observed many burlap-wrapped bales, which they suspected contained marijuana. *Id.* at A10-A11, A40-A41.

Following their departure, the agents obtained a warrant to search the building. In their application for the warrant, the agents did not mention the warrantless entry and did not make use of any information they had obtained as a result of that entry. Execution of the warrant resulted in the seizure of approximately 500 bales of marijuana, which were each marked with tapes bearing numbers, as well as notebooks listing the customers whose names corresponded with the numbers on the bales. Pet. App. A11, A28.

2. Prior to trial, petitioners moved to suppress the evidence discovered as a result of these searches and seizures. They alleged, inter alia, that the police lacked probable cause to stop their vehicles; that the warrantless search of the white truck was unreasonable; and that the warrantless entry into the warehouse, during which the marijuana bales were seen, was unlawful and vitiated the subsequent seizure of the bales pursuant to the search warrant. The district court denied the motions (Pet. App. A31-A47).

The court of appeals affirmed (Pet. App. A1-A30). The court held that the information furnished by the informants, coupled with the agents' own observations, provided sufficient probable cause to justify stopping the vehicles. It held that a warrant was not required to search the white truck that petitioner Rooney had been driving prior to his arrest simply because it was parked in a private driveway at the time the search was conducted. *Id.* at A11-A20. The court found that the warehouse search warrant was not invalidated by the fact that the application failed to mention the earlier warrantless entry of the building (*id.* at A26). The court also rejected petitioners' argument that the marijuana bales observed during that entry must be suppressed. The court found it unnecessary to resolve whether the warrantless entry was justified by exigent circumstances, namely, in order to avert the possibility that evidence would be destroyed by persons who may have been inside, noting that the failure of the district court to make findings on the question of exigency made it difficult to address the issue (*id.* at A23). Assuming arguendo that the warrantless entry was unlawful, the court reasoned that, because the bales of marijuana were in plain view, they would inevitably have been discovered as the result of the subsequent lawful warrant search. Under the principles of *Segura* v. *United States*, No. 82-5298 (July 5, 1984), and *Nix* v. *Williams*, No. 82-1651 (June 11, 1984), the court concluded therefore that there was not a sufficient nexus between the assumed illegality and the evidence in question to justify suppression (Pet. App. A27-A28).

3. a. Petitioners and the other co-defendants were indicted on April 20, 1983. On May 9, 1983, they filed various pretrial motions. Some of the motions sought suppression of the evidence seized; others sought other forms of relief such as severance, election of counts, and specification of the order of the government's proof. On October 17, 1983, the district court completed hearings on

the motions to suppress and took them under advisement. The motions for severance and other forms of relief were denied on December 21, 1983; the motions to suppress were denied on December 23, 1983. Trial began one month later, on January 23, 1984, some 278 days after the return of the indictment. Pet. App. A5, A63-A64.

On the day the trial began, petitioners and the other co-defendants moved to dismiss the indictment on the ground that the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, had been violated. In connection with the motion, they conceded that 195 days were excludable under the Act; in its subsequent order, the district court noted that an additional eight days were excludable because of the pendency of a government motion to use charts at trial--a finding that is not challenged by petitioners. These exclusions yielded an uncontested total amount of excludable time of 203 days, which left only five days in excess of the 70-day maximum prescribed by the Act. Pet. App. A48-A49.

b. The district court denied the motion to dismiss (Pet. App. A48-A50). The court noted that under Section 3161(h)(l)(J) of the Act only 30 days of the period between the October 17, 1983, suppression hearing and the December 23 ruling could be excluded as attributable to consideration of the suppression motions. The court explained, however, that the other pending motions, some of which concerned the ordering of the presentation of the government's evidence, would have been mooted if a suppression order had been entered; hence, those motions were not taken under advisement until the suppression motions were resolved. Those motions, the court reasoned, were not subject to the 30-day limit of Section 3161(h)(l)(J) for consideration of motions, but were covered by the provisions of Section 3161(h)(l)(F), which excludes "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion."

Under the latter provision, the trial court concluded that, even though the motion to suppress was under advisement for more than the 30-day period excludable under Section 3161(h)(l)(J), the additional period was not an unreasonable time "given the complexity of the testimony and the difficulty of determining the extent to which subjective judgment * * * should support a finding of probable cause." Because the rulings on the suppression motions could have been dispositive of the nonsuppression motions, the court stated that "it was reasonable to hold [those latter] motions until I had decided the motion to suppress" (*id.* at A49). Consequently, the court held that the full period between the filing of the motions and their disposition, representing 35 additional days not conceded by the defendants, was properly excludable (*id.* at A50).

c. The court of appeals affirmed this ruling also (Pet. App. A5-A9). In its initial opinion, the court rejected petitioners' contention (not renewed in this Court) that the 30-day period between October 17, 1983, and November 16, 1983, could not be excluded under Section 3161(h)(l)(J) without a showing that the court was actually considering the motions on each one of those days. Then, addressing the period "through December 23, 1983, during which the * * * [nonsuppression] motions were pending," the court held that the time was excludable under Section 3161(h)(l)(F) because it was reasonable for the district court to have withheld decision on those motions until it could decide the suppression motions. Accordingly, the court of appeals concluded that the total nonexcludable time amounted to only 45 days and that the Speedy Trial Act therefore was not violated.

d. Petitioners sought rehearing, noting that according to the docket sheet and the district court's own statements, the nonsuppression motions were decided on December 21, 1983, rather than on December 23, 1983, as both the district court and the court of appeals apparently had

assumed. See Pet. App. A63-A64. Accordingly, they argued that it could not have been necessary for the district court to dispose of the suppression motions before ruling on the others. Therefore, petitioners argued, no portion of the period after the suppression hearing should have been excludable under Section 3161(h)(l)(F). The court of appeals amended its opinion "for clarification," but otherwise denied the rehearing petition without opinion (Pet. App. A83-A84). The amended opinion noted that the court was not holding "that more than 30 days can be excluded under section 3161(h)(l)(J) for deciding the suppression motions" or that the entire period subsequent to the suppression hearing was excludable. The amended opinion also omitted the conclusion (Pet. App. A9) that the total nonexcludable time amounted to 45 days and substituted the conclusion that "the total nonexcludable time did not exceed 70 days and that the Speedy Trial Act was not violated." *Ibid.*[3]

ARGUMENT

1. Petitioner Rooney contends (85-1120 Pet. 12-17) that the warrantless search of his white Ford truck was unlawful because it was effected without a warrant. Specifically, he maintains that because the vehicle was locked and parked in a private driveway, and because he was in police custody at the time of the search, there were no exigent circumstances to justify proceeding without a warrant. This contention is without merit because it rests on a misperception concerning the conceptual basis for permitting warrantless vehicle searches.

As this Court recently explained in *California* v. *Carney,* No. 83-859 (May 13, 1985), slip op. 4-6:

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[3] The portion of the court of appeals' opinion that addresses the Speedy Trial Act question appears in its amended form at Pet. App. A87-A88.

> The mobility of automobiles, we have observed, "creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible." *South Dakota* v. *Opperman,* [428 U.S. 364, 367 (1976)].
>
> However, although ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception. The reasons for the exception, we have said, are twofold. 428 U.S., at 367. "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Ibid.*
>
> Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception. See, *e.g., Cady* v. *Dombrowski,* [413 U.S. 433 (1973)].
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> * * * * *
>
> * * * In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met.

See also *Florida* v. *Meyers,* 466 U.S. 380 (1984) (authorizing warrantless search of impounded car); *Michigan* v. *Thomas,* 458 U.S. 259, 261 (1982) ("the justification to conduct * * * a warrantless search does not vanish once the car has been immobilized"); *United States* v. *Chadwick,* 433 U.S. 1, 12 (1977) (noting that the Court has sustained warrantless searches of vehicles in cases in which "the possibilities of the vehicle's being removed or

evidence in it destroyed were remote, if not nonexistent" because of "the diminished expectation of privacy which surrounds the automobile"); *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion). Accordingly, because one's diminished expectation of privacy in a motor vehicle alone justifies a warrantless search of its interior on the basis of probable cause, it is inconsequential whether, at the time of the search, exigent circumstances independently would justify failure to obtain a warrant.

Petitioner's reliance (Pet. 16-17) on *Coolidge* v. *New Hampshire*, 403 U.S. 443, 458-463 (1971), is unavailing. First, the portion of the *Coolidge* opinion on which petitioner relies was joined by only four Justices and therefore lacks precedential effect. As discussed above, the plurality's suggestion there that an automobile search must be conducted with a warrant in the absence of exigent circumstances has been rejected by subsequent decisions. Moreover, as the court below observed (Pet. App. A19), this case is plainly distinguishable from *Coolidge*. Here, the agents searched petitioner Rooney's truck contemporaneously with his arrest. And, although his truck came to rest in a private driveway, the driveway was not his own, and the vehicle had been pursued to that location by the police, rather than resting there for some time as in *Coolidge*. It is difficult to see what significance should attach to the fact that petitioner Rooney drove into a private driveway before being stopped. It was not his driveway, and therefore he had no right to exclude the police from entering the driveway. And there is no reason why the expectation of privacy in the truck itself should be enhanced by its location in the driveway.

2. a. Petitioners Murray, Carter, and Moscatiello contend (85-1118 Pet. 8-19) that the court of appeals erred in holding that the marijuana bales seen during the brief, warrantless entry into the warehouse could be admitted at trial because they would inevitably have been discovered

during the course of the lawful warrant search. Petitioners do not dispute the admissibility of the other evidence seized during the warrant search and do not dispute that the marijuana bales in question would also have been admissible if they had not previously been seen by the officers in plain view. That much is clear from this Court's decision in *Segura* v. *United States,* No. 82-5298 (July 5, 1984).[4] Petitioners argue, however, that because the marijuana bales here were first discovered during the warrantless entry, they are a fruit of that assumed illegality.[5] That argument might well be correct if this Court had rejected the "inevitable discovery" doctrine in *Nix* v. *Williams,* No. 82-1651 (June 11, 1984). The Court, however, recognized the validity of that doctrine and set forth a rationale for the doctrine that is fully applicable to this case. As the Court in *Nix* explained, the inevitable discovery doctrine is akin to the harmless error rule, in that it ensures that evidence will not be suppressed because of police misconduct, if the evidence would have been obtained even absent that misconduct. Therefore, the Court held that if the prosecution can establish by a preponderance of the evidence "that the information ultimately or inevitably would have been discovered by lawful means

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[4] Indeed, because this case involves only a brief protective sweep of the warehouse, rather than the continuing unlawful occupation of the premises for 19 hours that occurred in *Segura,* it appears that even the dissenters in *Segura* might have agreed that this evidence would be admissible; the dissent placed considerable weight on this unlawful continuing seizure. See slip op. 4-12, 16-22 (Stevens, J., dissenting).

[5] We note that petitioners' entire submission rests on the assumption that the warrantless entry was unlawful because it was not justified by exigent circumstances—an issue that the court of appeals expressly declined to decide in the absence of relevant factual findings by the district court (see Pet. App. A23). The fact that this potentially dispositive issue remains unresolved and would have to be explored on remand in the event the Court were to reverse here provides an additional reason why certiorari is not appropriate in this case.

* * * then the deterrence rationale has so little basis that the evidence should be received" (*Nix*, slip op. 11). To suppress evidence in that setting, the Court stated, "would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity" (*id.* at 12).

In this case, whether or not the officers saw the marijuana bales during the course of their warrantless protective sweep, they clearly would have discovered those bales, as they did the other evidence, when they conducted the subsequent full search authorized by a valid warrant. Moreover, the observation of the bales during the agents' initial entry contributed nothing to the agents' decision to search the warehouse or to the legal basis asserted for the search. Thus, nothing in the principles set forth by this Court in *Nix* requires the suppression of this probative evidence, which was seized in the course of a lawful search, solely because the bales had been observed during a previous entry.

The thrust of petitioners' submission appears to be that the bales in question constituted "primary evidence" that was tainted by the illegal warrantless entry (see Pet. 9, 16-18). Thus, petitioners suggest that the decision below is inconsistent with *Segura* itself because the Court there noted that "[e]vidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion" (slip op. 8). But this statement in *Segura* is quite unexceptionable in its context and has nothing to do with the question presented here. First, the evidence in question here was not *obtained* as a result of an unconstitutional search; as *Segura* makes clear, it was obtained by means of a valid warrant search. The question is whether it is significant that the evidence had been *observed* earlier during an unlawful entry. Moreover, the "inevitable discovery" doctrine presupposes that the evidence in question may be "subject to exclusion" because it is " '*in some sense* the product of illegal governmental activity' " (*Nix*, slip op. 11, quoting *United States* v. *Crews*, 445 U.S. 463, 471

(1980) (emphasis in *Nix*)); the doctrine establishes that such evidence should not be excluded if it would inevitably have been discovered through lawful means. Hence, for petitioners to assert that the marijuana is subject to exclusion under long-established Fourth Amendment principles because it was initially discovered in the course of an illegal search (see Pet. 17-18) is simply to pose the question presented in this case—whether the bales are nonetheless admissible under the inevitable discovery doctrine—not to answer it.[6]

To the extent petitioners address the application of the inevitable discovery doctrine, they mischaracterize it as approving a " 'search-illegally-first-obtain-a-warrant-later' procedure" (Pet. 10 n.9; see also Pet. 18). The court of appeals did not suggest that police who make a warrantless search on the basis of probable cause can validate the discovery of evidence by an after-the-fact application for a warrant. The inevitable discovery doctrine is designed to avoid placing the police "in * * * a *worse[]* position" (*Nix*, slip op. 10 (emphasis in original)) than if no illegality had occurred, and it applies only in cases where "the police

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[6] The fact that petitioners' argument on the merits is misdirected is highlighted by their reference to the government's brief in *Segura* (Pet. 9 n.8). As petitioners note, the government stated that "evidence discovered in the course of an illegal search ordinarily should be excluded." Brief for the United States in *Segura* v. *United States*, No. 82-5298 (Oct. Term 1983), at 13. But that general statement is subject to qualification, *inter alia*, by the inevitable discovery doctrine. The government explicitly stated in its brief (at 36 n.21) that, if the Court were to adopt the inevitable discovery doctrine in *Nix*, it would be incorrect to suppress evidence seen during a warrantless security check that would inevitably have been discovered anyway during the later execution of a search warrant. And this issue was specifically reserved by the Court in *Segura* (slip op. 6 n.4). Thus, petitioners' assertion that its position is supported by the government's brief in *Segura*, like its assertion that it is supported by the Court's opinion there, is faulty because it simply ignores the inevitable discovery doctrine, which is at the heart of the question presented here.

would have obtained [the] evidence if no misconduct had taken place" (*id.* at 11). As this Court noted in *Nix* (slip op. 12-13), if the discovery of evidence by lawful means is truly "inevitable," so that the doctrine should apply, the police have little to gain by seeking to discover it by unlawful means. Thus, petitioners' hypothetical "search-illegally-first-obtain-a-warrant-later" procedure would not satisfy the prerequisites for application of the inevitable discovery doctrine.

This case, however, fully satisfies those prerequisites. The police did not enter the warehouse to search for evidence. They made a brief sweep through the warehouse to secure the premises and then departed to await the arrival of a search warrant. Regardless of whether the officers had made the warrantless entry or observed the marijuana, they would inevitably have obtained the warrant and discovered the bales in the course of a lawful search. The fact that they observed some marijuana in plain view in the course of the security sweep is an irrelevant happenstance; it makes no sense as a matter of exclusionary rule policy to suppress that evidence, especially since those items of evidence not observed during the protective sweep are plainly admissible.[7]

b. Petitioners' contention (Pet. 8, 10-16) that the decision below conflicts with numerous decisions of other courts of appeals and state courts is wrong because those decisions for the most part were rendered prior to this Court's decisions in *Segura* and *Nix*, and there is no reason to suppose that those decisions would be treated as good

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[7] We note that the dissenters in *Segura* recognized that it would make little sense to distinguish in this context between evidence that happened to be observed in plain view during an unlawful protective sweep and evidence not observed until later (slip op. 15, footnote omitted (Stevens, J., dissenting)): "If the execution of a valid warrant takes the poison out of the hidden fruit, I should think that it would also remove the taint from the fruit in plain view."

law today. For example, *United States* v. *Griffin*, 502 F.2d 959 (6th Cir.), cert. denied, 419 U.S. 1050 (1974), on which petitioners rely heavily (Pet. 10-11), did not focus on the distinction between evidence observed during an illegal entry and evidence observed for the first time during the ensuing warrant search. As a result, the *Griffin* case generally was read as standing for the proposition that neither kind of evidence could be admitted, even if it was obtained as a result of a subsequent search pursuant to an untainted warrant. See, *e.g.*, *Segura*, slip op. 5 (erroneous district court decision had relied on *Griffin*); *United States* v. *Allard*, 634 F.2d 1182, 1186-1187 (9th Cir. 1980). Now that *Segura* has established that evidence found in an apartment secured by means of an illegal entry may be admitted if it was obtained during a lawful warrant search and *Nix* has established the validity of the inevitable discovery doctrine, there is no reason to suppose that the Sixth Circuit would reach the same result in *Griffin* today. The Second Circuit's decision in *Segura*, while it does draw a distinction between the two kinds of evidence, did not consider the applicability of the inevitable discovery doctrine to evidence first observed during an initial, unlawful entry. In light of *Nix*, the Second Circuit's *Segura* decision cannot be considered binding authority today that such evidence ought to be suppressed.

Petitioners rely heavily on one case decided after *Segura* and *Nix*, *United States* v. *Satterfield*, 743 F.2d 827, 845-847 (11th Cir. 1984). That case, however, is distinguishable. First, in *Satterfield*, the evidence was *seized* in the course of the illegal entry; thus, the evidence was not actually obtained by the police through lawful means. Moreover, in *Satterfield* the unlawful entry was not made simply for the purpose of conducting a protective sweep to secure the premises while awaiting the issuance of a search warrant; it was made for the purpose of conducting a full-scale warrantless search for evidence.

On those facts, the Eleventh Circuit reasonably concluded that the warrant search was a separate and subsequent investigative measure that did not meet its requirements (derived from established Fifth Circuit precedent, *United States* v. *Brookins*, 614 F.2d 1037 (1980)), for application of the inevitable discovery doctrine. Specifically, the court of appeals held that the inevitable discovery doctrine did not apply because the lawful means of discovering the evidence was not "being actively pursued" prior to the illegal search (743 F.2d at 846).

This case is quite different. It does not involve two separate searches for evidence like *Satterfield*; rather, it involves one continuous series of events directed at lawfully searching the warehouse pursuant to a warrant. In March 1983, the investigating agents learned that petitioners were using a warehouse somewhere in South Boston to store marijuana (Pet. App. A33). On April 5, they followed petitioners and determined that the warehouse in question was the building at 345 D Street (*id.* at A37-A40). After observing that an individual who was guarding the warehouse had disappeared from view, the agents made a brief entry and sweep of the warehouse in the reasonable (though perhaps mistaken) belief that exigent circumstances justified such an entry "to apprehend any participants who might have remained inside and to guard against the destruction of possibly critical evidence" pending the arrival of a search warrant (*id.* at A41). After they established that no one was inside the warehouse, the agents waited until the search warrant was obtained. When the warrant arrived, the agents entered the warehouse and—for the first time—searched it for evidence. In short, the warrantless entry here was simply an early stage of a procedure designed to culminate in a warrant search, rather than a substitute for a warrant search, as in *Satterfield*. In light of this fundamental distinction, there is good reason to believe that the Eleventh Circuit would regard the situation here as one in

which the police were "actively pursu[ing]" the legal means of obtaining the evidence at the time of the illegal entry and therefore would regard the inevitable discovery doctrine as applicable. See, *e.g.*, *Wicker* v. *McCotter*, 783 F.2d 487, 497-498 (5th Cir. 1986). Hence, there is no genuine conflict between the decision below and *Satterfield*.[8]

There is one other court of appeals case that has addressed the question presented here in light of *Segura* and *Nix*; but that case reached the same conclusion as the court below. In *United States* v. *Merriweather*, 777 F.2d 503 (9th Cir. 1985), the court held that evidence observed during an unlawful search of a motel room was admissible because it would inevitably have been discovered during the ensuing warrant search. See also *United States* v. *Andrade*, 784 F.2d 1431 (9th Cir. 1986).

In sum, the decision below raises a question concerning the effect of unlawful initial intrusions that was not resolved by *Segura*. There is no true conflict among the courts of appeals that have addressed the question since *Segura* and *Nix*, and we submit that the courts in this case and in *Merriweather* have resolved it correctly. Therefore, review of this question by this Court may ultimately prove to be unnecessary and would be premature at this time.

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[8] *United States* v. *Dart*, 747 F.2d 263 (4th Cir. 1984) (see Pet. 10-12), while decided after *Nix* and *Segura*, is wholly inapposite. In that case, the court ordered suppressed *all* the evidence found in a warehouse when a warrant was obtained following a full-fledged warrantless search because the warrant was issued on the basis of evidence obtained during the illegal search. Indeed, the court strongly suggested that all of the evidence would have been admissible had the police merely conducted a brief sweep of the warehouse and then secured the premises pending the arrival of a valid warrant – precisely what was done here – rather than conducting a full-scale search. The court had no occasion to consider the issue presented here.

3. All petitioners contend (85-1105 Pet. 7-12; 85-1120 Pet. 18-22) that the court of appeals erred in calculating the amount of time that was excludable under the Speedy Trial Act for the consideration and decision of the pretrial motions.

At the outset, we note that petitioners' assertion that this case should be consolidated with or held for *Henderson* v. *United States*, No. 84-1744 (argued Apr. 1, 1986), is without foundation. That case presents a question on which the courts of appeals are divided: whether the pretrial motion exclusion contained in Section 3161(h)(1)(F) of the Speedy Trial Act[9] is subject to a "reasonable necessity" limitation. Compare *United States* v. *Henderson*, 746 F.2d 619 (9th Cir. 1984), cert. granted, No. 84-1744 (argued Apr. 1, 1986); *United States* v. *Mastrangelo*, 733 F.2d 793, 796 (11th Cir. 1984); *United States* v. *Horton*, 705 F.2d 1414, 1416 (5th Cir.), cert. denied, 464 U.S. 997 (1983); *United States* v. *Stafford*, 697 F.2d 1368 (11th Cir. 1983) (all excluding, without qualification, entire period between filing and disposition of pretrial motions) with *United States* v. *Ray*, 768 F.2d 991, 998 (8th Cir. 1985); *United States* v. *Mitchell*, 723 F.2d 1040, 1047 (1st Cir. 1983); *United States* v. *Janik*, 723 F.2d 537, 544 (7th Cir. 1983); *United States* v. *Novak*,

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[9] 18 U.S.C. 3161 provides in pertinent part:

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
>
> * * * * *
>
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

715 F.2d 810, 820 (3d Cir. 1983), cert. denied, 465 U.S. 1030 (1984); *United States* v. *Cobb*, 697 F.2d 38, 44 (2d Cir. 1982) (all limiting the length of the exclusion to that "reasonably necessary" for disposition of pretrial motions). The First Circuit has already aligned itself with those courts of appeals holding that the period of time excludable under Section 3161(h)(1)(F) is limited to that "reasonably necessary from the time of filing a pretrial motion to the time of concluding a hearing on it or completing submission of the matter to the court for decision" (*United States* v. *Mitchell*, 723 F.2d at 1047). Indeed, the court of appeals specifically adverted to this "reasonableness" requirement in making its determination regarding the correct computation of time excludable under Section 3161(h)(1)(F). See Pet. App. A9, A87. Therefore, even if this Court reverses in *Henderson* and holds that the pretrial motion exclusion of Section 3161(h)(1)(F) is subject to a "reasonable necessity" limitation, the ruling would have no effect on the result in this case.

Assuming, as did the court below, that the pretrial motion exclusion contained in Section 3161(h)(1)(F) is subject to a limitation based upon a determination of reasonable necessity, the question is simply whether the period of time excluded under that section was reasonably necessary for the disposition of the particular pretrial motions filed in this case. That fact-bound question was correctly decided by the court below and plainly does not merit review by this Court.

Petitioners obfuscate the issue here somewhat by repeatedly suggesting that the court of appeals approved an excludable period of 195 days to decide the nonsuppression motions. That is misleading. Petitioners conceded in the court of appeals (see Pet. App. A5) that the bulk of that period, from the filing of the pretrial motions on May 9, 1983, to the suppression hearing on October 17, 1983,

was excludable. And the court of appeals' holding that the 30-day period following the hearing, during which the suppression motions were under advisement, was excludable under Section 3161(h)(1)(J) is plainly correct and is not challenged by petitioners.

Thus, the question here is simply whether at least five additional days are excludable as a period reasonably necessary for the district court to consider the nonsuppression motions, either before they were taken under advisement (18 U.S.C. 3161(h)(1)(F)) or after they were taken under advisement (18 U.S.C. 3161(h)(1)(J); see *United States* v. *Tibboel*, 753 F.2d 608, 611-612 (7th Cir. 1985)). Petitioners do not dispute that at least five days were required to consider these motions; indeed, they suggest that a month would have been a reasonable time (85-1105 Pet. 12). Their assertion is that the district court should have completed its consideration of those motions during the period that the suppression motions were awaiting decision. The district court explained, however, that, because suppression of the evidence would obviate the need to rule on some or all of the nonsuppression motions, it considered it appropriate to postpone consideration of those latter motions until after it had decided the suppression motions. The court of appeals agreed that it was reasonable for the district court to order its consideration of the motions in this manner. Under that analysis, the time attributable to the consideration of the nonsuppression motions did not occur during the period already excluded because of the suppression motions, but rather did not begin until the motions were taken under advisement at a later time. This results in the exclusion of at least five additional days, which satisfies the statutory limitations of the Speedy Trial Act.[10] Therefore, petitioners can prevail

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[10] Under 18 U.S.C. 3161(h)(1)(J), it is clear that 30 days would be excludable for consideration of these motions after they were taken under advisement. The court of appeals did not specify the exact days

on this point only if they demonstrate that the district court acted unreasonably in considering the nonsuppression motions during the period between November 16 and December 21, 1983.

Petitioners make no effort to argue that it was unreasonable for the district court to wait until it had determined to deny the suppression motions before beginning to consider the nonsuppression motions. For the reasons well stated by the courts below (see Pet. App. A8-A9), it clearly was reasonable for the district court to order its docket in this fashion. See also *United States* v. *Anello*, 765 F.2d 253, 256 (1st Cir. 1985), cert. denied, No. 85-679 (Nov. 18, 1985). What petitioners contend is that the district court in fact did not order its docket in this manner because the record shows that the nonsuppression motions were denied on December 21, while the suppression motions were denied on December 23. This hypertechnical objection misses the point because the dates on which the court's orders were entered do not necessarily reflect the periods during which the court was actively considering the various motions.

On December 23, 1983, the district court entered a detailed opinion (Pet. App. A31-A47) addressing the diverse and complex suppression issues raised by petitioners. It is obvious that the preparation of that opinion took more than two days and therefore that the district court had determined prior to December 21 that it would deny the suppression motions. Thus, the docket information relied upon so heavily by petitioners provides no basis

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that were excludable, but it was unnecessary to do so here because the excludable time needed to satisfy the Speedy Trial Act was so short. As long as the nonsuppression motions were not taken under advisement during the first five days after the suppression hearing, which plainly did not occur, the Act was satisfied. Thus, in order to prevail, petitioners must show that the district court did not reasonably postpone taking the nonsuppression motions under advisement until after it had determined to deny the suppression motions.

for doubting the district court's explanation that it did not begin to consider the nonsuppression motions until it had decided the suppression motions. On the contrary, the record is fully consistent with the description of the course of events that formed the basis for the court of appeals' decision: numerous motions were filed by the defendants and held in abeyance until the suppression hearing was held; at that point the court first considered the suppression motions. When the court had determined to deny the suppression motions and while an opinion was being prepared, the court turned to the nonsuppression motions and considered them so that it could enter orders on all the motions at approximately the same time. It was reasonable and consistent with the time limits of the Speedy Trial Act for the district court to proceed in this fashion, and, whether its order denying the nonsuppression motions was entered on December 21 or December 23, there is no basis for disbelieving the district court's assertion that it did so proceed.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
JOHN F. DE PUE
Attorney

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